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In The

Supreme Court of the United States

October Term, 1997

COUNTY OF THURSTON, NEBRASKA AND MARK CASEY, IN HIS OFFICIAL CAPACITY AS CHAIR OF THE BOARD OF SUPERVISORS OF THURSTON COUNTY, NEBRASKA,

Petitioners,

vs.

HOLLIS D. STABLER, JR., SHARON FREEMONT, OMAHA TRIBAL HISTORICAL PROJECT INC., AND RED FEATHER FAMILY SERVICES, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the courts below were correct in considering the Native American share of the voting age and total population, both of which showed an underrepresentation of Native American voting strength, as part of the totality of circumstances analysis under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973.

RULE 29.6 STATEMENT

This brief is filed on behalf of two individuals and two nonprofit corporations, the Omaha Tribal Historical Project, Inc. and the Red Feather Family Services, Inc. These corporations do not have any parent or subsidiary companies.

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STATEMENT OF THE CASE

The Claims

The questions presented by Thurston County and the Chair of the Thurston County Board of Supervisors are not fairly presented in this record. Specifically, this case is not an appropriate vehicle for considering whether dilution claims under Section 2 should be judged by reference to voting age population or total population since the record in this case clearly establishes the underrepresentation of Native American voting strength under either measure. Likewise, petitioners' contention that this case reflects a mistaken reliance on notions of proportional representation is belied by the record and the express holding of the court below.

Plaintiffs-respondents are Native American voters and organizations who challenged the single-member district plan of the Thurston County, Nebraska, County Board of Supervisors.[1] The claims were brought under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973 and the first, thirteenth, fourteenth and fifteenth amendments of the Constitution of the United States.

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[1] Plaintiffs also challenged the at-large methods of electing the governing bodies of a village (Walthill) and school board (District 13) within Thurston County. Judgment was entered for those defendants and those claims are not before this Court.

Defendants below who are not before this Court are Thurston County School District 13 and its chair Keith Mahaney, Village of Walthill, Nebraska and the chair of its board of trustees Steve Dunn, and Patricia Higgins, county clerk of Thurston County.

The Historical Background

In 1979 the Thurston County Board of Supervisors entered into a consent decree in a lawsuit brought by the United States alleging dilution of the votes of Native Americans. The seven single-member districting plan adopted by the decree included two majority Native American districts based on a 1975 Native American population of 28.5 percent. Pet. App. 30. Despite increases in the Native American population, the county redistricted twice (after the 1980 and 1990 censuses) retaining only two majority Native American districts. In 1980, nonwhites (being almost exclusively Native Americans) made up 33.8% of the population. In 1990, Native Americans constituted 43.92% of the total population and 35.9% of the voting age population (VAP). Pet. App. 30, 31. Between 1980 and 1990, the total population *decreased* by 250 persons, from 7,186 to 6,936. The white population decreased by 898 persons; the Native American population *increased* by 619 persons. Pet. App. 31; Pl.Ex. 100, T. 77, 79).

The challenged plan was drawn by the chair of the county board of supervisors, Mark Casey, with the assistance of the county attorney who had worked on the 1979 consent decree. Casey testified "[w]e didn't pay any attention at all to the data broke down by race . . . " T. 697.

Plaintiffs claimed that the plan diluted Native American votes by both packing and cracking the Native American population. As the district court found:

> Native Americans constitute a majority of the total population (87.9% and 96.9%) and of the

> VAP (82.8% and 94.5%) in Districts Nos. 4 and 6, respectively. The other five districts contain majority white populations and VAPs. However, Native Americans represent a substantial portion of the total population (41.2%, 30.9% and 46.3%) and VAP (36.9%, 22.7% and 36.4%) in Districts Nos. 2, 3 and 5, respectively.

Pet. App. 31.

The Proceedings in the District Court.

Plaintiffs presented evidence to establish vote dilution under Section 2 following *Thornburg v. Gingles*, 478 U.S. 30 (1986), and its progeny. The evidence established that: (1) Native Americans are sufficiently large and geographically compact to constitute a majority in three of seven single member districts; (2) Native Americans are politically cohesive; and (3) the majority votes sufficiently as a block usually to defeat the candidates favored by the minority. To support their claim of vote dilution "based on the totality of circumstances," plaintiffs introduced evidence of a history of discrimination, the extent to which minorities have been elected to office, the extent to which the minority voters bore the effects of discrimination which hinder their ability to participate effectively in the political process, and evidence of the presence of other factors that enhanced the opportunity for discrimination. *Gingles*, 478 U.S. at 44-45; *Johnson v. DeGrandy*, 512 U.S. 997, 1018 (1994).

Following a four day trial in which the testimony of lay and expert witnesses was heard along with more than 150 exhibits, the district court held for plaintiffs on their vote dilution claim under Section 2. The court first held

that plaintiffs established the three *Gingles* factors. Pet. App. 32-39. Even defendants' evidence established their presence. Defendants' expert conceded that a third compact district could be drawn. Pet. App. 32-33, 37; T. 456-57. Similarly, defendants' expert testified "that candidates of choice of Native American voters appear to have been usually defeated due to non-Native American bloc voting." T. 612.[2] The average white cross-over vote for Native American candidates was 11%. T. 200. The district court found:

> After considering the entirety of the parties' analysis covering elections from 1978 to 1992, the Court finds that Native American cohesion, racially polarized voting and white bloc voting have been consistently present in Thurston County over this period.

Pet. App. 39. The county did not contest the presence of the three *Gingles* factors on appeal, Pet. App. 14, and do not challenge them in this Court.

The county did challenge the adequacy of the additional evidence going to the existence of vote dilution under the totality of circumstances test. This evidence included the following.

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[2] Defendants generated turnout data that showed a consistent pattern across elections of severely depressed Native American voter turnout. In the three primary and three general elections between 1988 and 1992, the average Native American turnout was 20.2% of voting age population and the average white turnout was 54.3%. (Pl.Ex.157, T. 212; Pl.Ex. 173, T. 555, 558.)

Socio-Economic Disparities Socio-economic data from the 1990 census established great disparities between Native Americans and non-Native Americans in Thurston County. (Pl.Ex. 60 through 69, T. 70; 70 through 78, T. 76-77; and 112, T. 80-81.) Per capita income of Native Americans is 36% that of whites ($3,996 vs. $11,043); more than 57% of the Native American households earn less than $15,000 compared to 35% of whites; in 1989 55% of Native Americans lived below the federal poverty level compared to 12% of whites; 32% of Native Americans 16 years of age and over in the labor force were unemployed compared to 3% of whites. Native Americans in Thurston County have significantly higher rates of morbidity and mortality than do white residents. According to the Indian Health Service, the infant mortality rate for the Omaha-Winnebago service unit was nearly twice that of the United States and of the State of Nebraska and the age-adjusted mortality rate from all causes was nearly three times that of the United States. (Pl.Ex. 143, T. 83-4; Pl.Ex. 144, T. 83-4, received by order of June 6, 1995, docket entry 142.)

Disparities in Employment and Social Segregation Though more than a third of the county's adult population is Native American, only one of the 50 employees of Thurston County was Native American. Deposition of Chairman Mark Casey, pp. 39-40, Pl.Ex. 165, T. 395-96. T. 751-52.

Native Americans and whites live separately in addition to socializing and worshiping separately. Pet. App. 17. Two-thirds of all Native Americans reside in census blocks which are 90% or more Native American; over 80% of whites reside in census blocks which are 90% or more

white. This segregation also extends to voting precincts in the county. (Pl.Ex. 55, T.14; 55A, T. 65; 55B, T. 65; 56, T. 14.) As the court of appeals noted,

> Thurston County, School District 13, and the Village each employ only one Native American, and social organizations in Thurston County are not racially mixed. Consequently, the white majority has little interaction with most Native American candidates, and, therefore, the opportunity to become known as a person and to be trusted with public office is not equal.

Pet. App. 17.

The Personal Nature of Campaigns Social segregation is particularly significant in Thurston County because political campaigns are primarily reputation and word of mouth. Little or no advertising is done. Elected officials testified that what is important is how well known you are in the community before the campaign, that voters vote for "candidates that they know and trust." T. 378; T. 132, 138, 140, 310, 660. They attributed their vote-getting ability to long personal and family standing in the community. T. 379, 659, 661. Elected officials testified that they "just signed up," that they did not really campaign, that they spent no money on their campaigns. T. 359, 660, 726.[3]

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[3] The only Native American to ever be elected by a majority white electorate within Thurston County, Edwin McCauley, was elected to the defendant school board after this suit was filed. Like white elected officials, he testified he did not campaign. He was well known because he had served as a county supervisor, being elected from a majority Native American single member district in 1980 and 1984. He lost an at-large county supervisor election in 1972. T. 358, 368.

In comparison, Charles Merrick, a Native American who twice ran unsuccessfully for his district school board in Thurston County testified about his experience with a white neighbor:

> . . . I had a neighbor, he since has left, . . . he was out walking up the street one day and I talked with him and he asked me if I was running for the school board and I told him I was.
>
> He said, "I'm fearing for the school board. If Indians get up there it's going to go to hell and I'm going to move."

T. 311-12; Pet. App. 19.

Depressed Level of Native American Candidacies Few Native Americans have been elected to office in Thurston County. At the implementation of single-member districts in 1980, a Native American ran for District No. 4 (a majority Native American district) and was defeated. No Native American has since offered for that seat. (Plaintiffs do not claim that District 4 fails to provide Native Americans the opportunity to elect the candidate of their choice.) District 6, the other majority Native American district, has continually been represented by a Native American since its inception. Only three Native Americans have run in a majority white district, all unsuccessfully.

History of Discrimination The district court took judicial notice of various statutes, treaties and court decisions which reflected a history of discrimination against Native Americans in Nebraska and Thurston County. (Docket entry 116, requests 1-15, 21-23, 28-30, 33. T. 9-10.) Legislation prohibited Native Americans from voting

unless they "owned real estate and are entirely freed from all tribal relations," 1867 Neb. Laws 20, excluded Native Americans from counting for state legislative apportionment, outlawed marriages and divorces among Indians held according to Indian custom, 1913 Neb. Laws 201-03, and repeatedly banned the possession by or sale to "Indians or half breeds" of ammunition, fire-arms and liquor up through 1943. 1943 Neb. Laws 419-20. Indians did not gain citizenship by virtue of the fourteenth amendment. They were not made citizens until the Citizenship Act of 1924, 8 U.S.C. § 1401.[4]

In 1985, the county board of supervisors adopted a resolution opposing the Winnebago tribe's effort to have criminal and civil jurisdiction over the reservation. Thurston County's representative in the Nebraska legislature opposed Native American jurisdiction, while conceding in his testimony before the state legislative judiciary committee that "[t]he racial discrimination faced by the Winnebago in Thurston County is a burden thrust on them by the white man for hundreds of years, and I would have to be blind or foolish to suggest that it doesn't exist on the Reservation today." (Pl.Ex. 82, p. 9, admitted to show the legislator made the statement, Order of June 6, 1995, Docket entry 142.)

Both Total And Voting Age Population Information Were Properly Considered by the Courts As part of the totality of circumstances inquiry, the district court also

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[4] See *Elk v. Wilkens*, 112 U.S. 94 (1884); *Omaha Tribe of Nebraska v. Village of Walthill*, 334 F.Supp. 823, 834 (D. Neb. 1971), *aff'd*, 460 F.2d 1327 (8th Cir. 1972).

addressed what became the primary defense – the argument that the existing apportionment provided Native Americans with districts roughly proportional to their presence in the county. The district court applied the holding of *Johnson v. DeGrandy*, that proportionality "is a relevant fact in the totality of circumstances." Pet. App. 40, quoting *DeGrandy* at 1000. The district court also considered *DeGrandy's* discussion of what constitutes the relevant population and concluded that this Court's "repeated reference to voting age population in *Johnson* [*v. DeGrandy*] indicate[d] a preference for that benchmark in performing proportionality analysis." Pet. App. 41. It also noted that the Eighth Circuit approved the use of voting age in *African Am. Voting Rights Legal Defense Fund, Inc. v. Villa*, 54 F.3d 1345 (8th Cir. 1995) (*Villa*). Pet. App. 41. In view of these cases, the district court held that it would be appropriate to "*consider* both total and voting age population in its totality analysis." Pet. App. 41 (emphasis added). It noted that three majority Native American districts of seven would be closer in proportionality to their presence in *both* voting age and total population than the current two minority districts. Native American voting age population of 35.9% and total population of 43.92% are both closer to 42.86% (3 of 7) than to 28.57% (2 of 7). *Id.* Considering this along with all of the other evidence in the totality of circumstances analysis, the district court found that the current plan diluted Native Americans' voting rights in violation of Section 2 of the Voting Rights Act.

The county subsequently drafted a seven single member district plan with three majority Native American districts. The court ordered the plan into place and

directed the plan be implemented in the 1998 election. Order of June 6, 1996, Docket entry 170.

Having found a violation of Section 2 under which plaintiffs could secure all of the relief that might also be available under the fourteenth and fifteenth amendments, the district court had no need to address the constitutional claims and did not do so. In the petition to this Court, though the county correctly recites that "[t]he district court made no findings regarding the plaintiffs' claim that the County had engaged in intentional discrimination," it inaccurately contends that plaintiffs' constitutional claim was rejected by the district court. Pet. 8 and 22, n.6.

The Proceedings in the Court of Appeals

The county appealed but, as noted, conceded the findings that plaintiffs established the three *Gingles* factors. Pet. App. 14. The county contended that there were insufficient findings under the "totality of circumstances test" but that was rejected by the court of appeals; the appellate court also determined that the district court's findings were not clearly erroneous. *Id.* 14-18.

The court of appeals rejected the county's argument that the district court had confused "the concepts of 'proportional representation' and 'proportionality'" as discussed in *Johnson v. DeGrandy*. Pet. App. 11-12. The county's contention that the district court sought to guarantee proportional representation, the election of a set number of Native American candidates, is inconsistent with the record. The district court was aware that District 4, a majority Native American district, had always elected

a white county commissioner, and that plaintiffs did not challenge the ability of Native Americans in that district to elect their candidate of choice. The district court approved the county's remedial plan in which two of the three majority Native American districts have Native American populations, both total population and VAP, that are *lower* than that of the original District 4 which has *never* elected a Native American. Docket entries 159 and 170.[5] The court of appeals was correct in rejecting the county's argument that the district court misunderstood the proviso to Section 2 against guaranteeing that a set number of minority individuals are elected.

The county argued that the district court was wrong to consider total population at all and that its two majority-minority district plan already provided "substantial proportionality" under *DeGrandy*. The court of appeals specifically addressed the county's contention that the district court erred in its use of both total and voting age population and in its consideration of proportionality. Pet. App. 12. The court of appeals did not reject its own precedent that approved the use of voting age population. *African Am. Voting Rights Legal Defense v. Villa*, 54 F.3d 1345, 1353 (8th Cir. 1995) ("the district court's use of voting age population was consistent with *Johnson* [*v. DeGrandy*] and was not error"). The court of appeals

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[5] That district was 87.9% Native American in total population and 82.8% in VAP. The remedial plan adopted by the county and approved by the court actually *lowered* the Native American percentages in District 4 to 85.1% total and 79.6% VAP. New District 5 has a total Native American population of 79.8% and a VAP of 73.1%.

essentially held the use of total population was not error because Native Americans were underrepresented under both population measures. It held:

> Under the current plan, Native Americans are under-represented by more than 7% considering VAP and 15% considering total population. Under the district court's plan, Native Americans would be over-represented by less than 7% considering VAP and under-represented by less than 1.5% considering total population. Whether we consider the total population or the VAP, the proposed three majority-minority districts plan results in less disparity than the current plan and more closely approximates rough, or substantial, proportionality, as discussed in *Johnson*, 512 U.S. at 1023, 114 S.Ct. at 2662 in which the Supreme Court upheld a districting plan with approximately a 2% population disparity, and in *Villa*, 54 F.3d at 1353, in which this court approved a districting plan with less than a 1% disparity.

Pet. App. 12-13. Contrary to the assertion made by the county, the court of appeals did *not* hold that rough proportionality "cannot exist" when the underrepresentation of minority voters "is more than 2%." Pet. 17. Nor did the court of appeals decide, as put in the first question presented by petitioners, Pet. i, 9. that "the existence of 'proportionality' should be determined on the basis of the minority's share of the total population." The court of appeals merely affirmed the holding of the district court that total population information, along with voting age population, is relevant to the Section 2 inquiry.

The court of appeals also rejected the county's argument, which it also makes to this Court, that "substantial

proportionality" should be defined as "the maximum number of majority-minority districts possible without exceeding proportionality." Pet. App. 13. The court of appeals held:

> Only in a rare case will the population ratios match the fractions of the number of districts such that one group is not over-represented. There is no reason why the Native American minority in this case should continue to bear the burden of under-representation under the current scheme while the white majority enjoys over-representation. The creation of a third majority-minority district will not harm non-Native Americans because the evidence does not show that Native Americans vote as a bloc to defeat white voters' candidates of choice. Moreover, the evidence indicates that Thurston County intentionally discriminated against Native Americans because it failed to make adjustments during the 1990 redistricting process in response to the information gathered in the 1990 census demonstrating a shift in the population's racial composition due to the increased Native American population. This evidence shows that Thurston County maintained its current districting system with a discriminatory intent and thwarted Congress's purpose in amending §2 in 1982 to provide "equally open" political processes. *See Johnson*, 512 U.S. at 1018-19, 114 S.Ct. at 2660-61.

Pet. App. 13-14.

The county repeatedly contends, erroneously, that the district court rejected plaintiffs' constitutional claims, implying that the court of appeals' finding of intentional discrimination is inconsistent with the district court's

judgment. As noted above, the district court made no findings on intentional discrimination, and having found a statutory violation it had no need to address the constitutional claims. The district court followed proper jurisprudence and addressed plaintiffs' statutory claim first. *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring); *Three Affiliated Tribes v. Wold Engineering*, 467 U.S. 138, 157-58 (1984); *Escambia County v. McMillan*, 466 U.S. 48, 51 (1984). The court of appeals properly determined that the evidence indicated that Thurston County intentionally discriminated against Native Americans as part of its reasoning in affirming the judgment below, a ground presented as an additional basis for affirmance. Brief of Appellees, Cross Appellants, at 33, *Stabler v. County of Thurston*, 129 F.3d 1015 (8th Cir. 1997). Neither court reached out to issue a ruling on the unnecessary question of whether the evidence also established a constitutional violation.

REASONS FOR DENYING THE WRIT

None of the questions presented by the petition are in fact presented by the record. The court of appeals did *not* hold that total population must be, or in fact was in this case, the measure of rough proportionality. The court of appeals did *not* hold that rough proportionality cannot exist where the disparity in minority voter representation is more than two percent. And the court of appeals did *not* mandate proportional representation. Further, petitioners do not contend that the court of appeals' decision conflicts with that of any other circuit. (The conclusion of the petition states that the rulings of the court of appeals

"are at odds . . . with the holdings of most other lower courts," Pet. 24, but the petition does not identify any.)

The decisions by the two courts below addressed a factually developed record and correctly applied the "totality of circumstances" analysis under Section 2 of the Voting Rights Act as developed through decisions of this Court.

Petitioners seek review by arguing that the issues they frame should be clarified to resolve issues that may arise in the redistricting following the year 2000. But those issues are not presented in this litigation and are merely a request for advisory opinions. Nothing in the petition merits review under Rule 10 of this Court.

I. THE QUESTIONS PRESENTED IN THE PETITION FOR WRIT OF CERTIORARI ARE NOT PRESENT IN THE RECORD IN THIS CASE.

A. Neither Court Below Held that the Existence of Rough or Substantial Proportionality Under Section 2 Should be Determined by Total Population.

The opinions below make absolutely clear that neither the district court nor the court of appeals considered total population as anything more than additional evidence to the voting age population in the assessment of whether the challenged plan provided Native Americans with rough or substantial proportionality, as that term was defined in *Johnson v. DeGrandy*, as part of the totality inquiry. Both courts found that Native Americans were underrepresented under both population figures. The

county's argument is flatly inconsistent with what the courts actually did.

Additionally, this Court has held that Section 2 analysis requires the trial court

> to consider the totality of circumstances and to determine, based upon a searching practical evaluation of the past and present reality, whether the political process is equally open to minority voters.

Gingles, 478 U.S. at 79 (internal quotations and citations omitted). The county has not suggested any reason total population should be excluded from the assessment of the totality of circumstances.

B. The Court of Appeals Did Not Hold That "Rough Proportionality" as Defined by *Johnson v. DeGrandy* Cannot Exist If The Disparity in Representation Exceeds Two Percent.

The county's argument that the court of appeals held that rough proportionality cannot exist when the difference between the minority's share in the population and the percentage of districts in which Native Americans are a majority exceeds two percent is simply of whole cloth. The citation by the court of appeals of *Johnson v. DeGrandy* and *Villa* which approved districting plans with disparities of 1-2% cannot be credibly interpreted as meaning the court of appeals held disparities larger than that were impermissible. See Pet. App. 12-13.

This Court has rejected arguments for inflexible rules in the application of Section 2, *Johnson v. DeGrandy*, 512 U.S. at 1018 ("[a]n inflexible rule would run counter to

the textual command of § 2"); *Gingles*, 478 U.S. at 58 ("there is no simple doctrinal test for the existence of legally significant racial bloc voting"), and none was applied here.[6]

C. The Court of Appeals Did Not Mandate Proportional Representation.

The opinions of both courts below reflect a careful consideration of the factual record. Nothing in either opinion suggests that either court applied a standard of mandatory proportional representation.

Though the county quotes the language from *Johnson v. DeGrandy* which explains the difference between the "proportional representation" proviso of Section 2 and the concept of proportionality which links the number of majority-minority districts to the minority members' share in the relevant population, the county continues to merge these distinct concepts. Petitioners view the creation of a remedy which provides rough proportionality as forbidden "proportional representation for minority groups," Pet. 22, and consider the concepts interchangeable. Pet. 23. It is petitioners who are confused. The

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[6] The county asks this Court to adopt an inflexible test for substantial proportionality, defined as "substantial proportionality exists when a legislature has created the maximum number of majority-minority districts possible without exceeding proportionality." Pet. 19. This definition is from *Rural West Tenn. African-American Affairs Council, Inc. [RWTAA] v. McWherter*, 877 F.Supp. 1096, 1107, n. 12 (W.D.Tenn.) (three-judge court), *aff'd mem., sub nom. RWTAA v. Sundquist*, 516 U.S. 801 (1995). This inflexible test would bar a 19% minority in a five district jurisdiction from any Section 2 claim.

decision below is clear and consistent with prevailing law.

We have discussed above in Section I.B. that the petition presents no issue regarding "proportional representation" as that concept is used in Section 2 and as elucidated by *Johnson v. DeGrandy*. This section addresses the county's contention that the court of appeals rotely mandated rough proportionality.

There was nothing automatic about the court of appeals' consideration of any of the evidence, or of its review of the district court's finding that the consideration of proportionality weighed in favor of plaintiffs as a relevant part of the totality of circumstances analysis. The district court found, and the court of appeals affirmed, the presence of Native American vote dilution after first finding the presence of the three *Gingles* factors and then proceeding to the totality inquiry. As a relevant part of this inquiry, both courts considered proportionality as directed by *Johnson v. DeGrandy*. In its review the court of appeals also found evidence of intentional discrimination. The county's argument that the finding of intentional discrimination was made "*solely* on the basis of the County's failure to provide Native Americans with proportional representation," Pet. 21 (emphasis in original), is an inaccurate oversimplication. The court of appeals did not reach its conclusion in a vacuum. It did *not* rule that merely because demographics would allow for a third majority-minority district that the county had to draw it. It did find, in a county with extreme racially polarized voting, adherence to the status quo of two majority-minority districts while ignoring data showing a

54% increase in the Native American share of the population was evidence that indicated intentional discrimination. *See Rogers v. Lodge*, 458 U.S. 613, 627 (1982) (affirming finding that system was maintained for discriminatory purposes). *Compare Bush v. Vera*, 116 S.Ct. 1941, 1969 (1996) (O'Connor, J., concurring, noting that in view of case law going back to 1966 "it would be irresponsible for a State to disregard the § 2 results test.")

The courts below did not run afoul of *Johnson v. DeGrandy's* rejection of rough proportionality as a safe harbor defense. That theory was rejected in part because it might be an "irresistible inducement" to create majority-minority districts "even in circumstances where they may not be necessary to achieve equal political and electoral opportunity." 512 U.S. at 1019-20. In contrast here, a third district was found to be necessary on the basis of a full record showing the presence of vote dilution. If there is "irresistible inducement" in this judgment, it is only the inducement to comply with the Voting Rights Act, as written by Congress and interpreted by this Court in *Johnson v. DeGrandy* and elsewhere.

Once again, the issue the county seeks to raise is not presented on this record.

II. PETITIONERS SEEK AN ADVISORY OPINION AS TO ISSUES NOT PRESENTED IN THIS LITIGATION.

For the reasons discussed in Section I above, petitioners are in reality seeking review of issues that are not fairly presented in this record. They contend that such

issues should be clarified because they may arise in the redistricting throughout the country following the year 2000. Petitioners are seeking advisory opinions that are not presented as actual controversies in this litigation. Consequently, the petition does not present reviewable questions. *See, Flast v. Cohen*, 492 U.S. 83, 95 (1968) ("no justiciable controversy is presented . . . when the parties are asking for an advisory opinion"). *Cf. Texas v. United States*, 66 U.S.L.W. 4234 (U.S. Mar. 31, 1997).

III. THE PETITION SEEKS REVIEW OF AN INTENSELY FACTUAL DETERMINATION, A POSTURE THAT DOES NOT MERIT PLENARY REVIEW BY THIS COURT.

This Court does not usually undertake to review the concurrent findings of two lower federal courts, *Neil v. Biggers*, 409 U.S. 188, 193, n. 3 (1972), or reverse "view[s] that the Court of Appeals could properly take of the evidence." *Hunter v. Underwood*, 471 U.S. 222, 232 (1985). The district court and the court of appeals properly performed their functions in the intensely factual analysis presented by a Section 2 claim, and did so consistently with the precedents of this Court. No purpose would be served by review in this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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